

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-216549

DATE: December 5, 1984

MATTER OF: Carlson Plumbing and Heating

DIGEST:

1. Amount withheld from contractor for labor standards violations and for liquidated damages assessed as a result of Contract Work Hours and Safety Standards Act violations has first priority.
2. Tax levy has priority over claim of payment bond surety and trustee in bankruptcy established after tax levy.
3. In order for a lending institution to achieve the status of an assignee under the Assignment of Claims Act, it has to be shown that the monies that the institution advanced to the contractor were actually used in, or at least made available for, the performance of the contract.

The contracting officer, Ninth Coast Guard District, United States Coast Guard (Coast Guard), Department of Transportation, requested a decision from our Office concerning the disposition that should be made of \$8,005.68 withheld from Carlson Plumbing and Heating (Carlson) under contract DTCG30-82-C-05052.

The Coast Guard indicates that \$3,904.15 of the total amount was withheld as a result of wage and overtime violations discovered by the Department of Labor under the Davis-Bacon Act, 40 U.S.C. § 276a (1982), and the Contract Work Hours and Safety Standards Act (CWHSSA), 40 U.S.C. § 327 (1982). In addition, \$390 in liquidated damages was assessed against Carlson for the CWHSSA violations.

The Internal Revenue Service (IRS) filed a notice of levy dated August 10, 1983, for \$26,425.97 for taxes owed by Carlson. Three subcontractors have given notice of claims for work performed for Carlson. The subcontractors' claims are not for settlement by the government, but rather are for consideration by the payment bond surety. K.B.J. Engineering, Inc., B-190181, Dec. 8, 1977, 77-2 C.P.D. ¶ 445;

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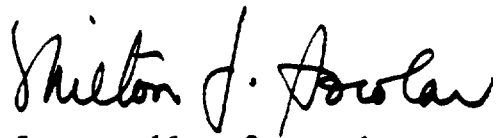
✓37 Comp. Gen. 116 (1957). American Druggists' Insurance Company (American) (the payment bond surety) has indicated that it settled two of the three claims and has recently received the third. American claims the contract balance. American also states that Carlson has filed for bankruptcy. The bankruptcy petition was filed on October 14, 1983. Charlevoix County State Bank (Charleviox) (an assignee of Carlson) also claims the contract balance.

The amount withheld for labor standards violations and for liquidated damages assessed as a result of the CWHSSA violations has first priority. Cascade Reforestation, Inc., ✓56 Comp. Gen. 499 (1977), 77-1 C.P.D. ¶ 250. Therefore, the \$3,904.15 withheld to adjust employee compensation under the Davis-Bacon Act and CWHSSA should be remitted to the General Accounting Office for disbursement. The \$390 in liquidated damages for CWHSSA violations should be deposited to the liquidated damages account.

The \$4,097.63 balance then remaining from the \$8,005.68 withheld should be remitted to IRS in partial settlement of the \$26,425.97 owed in back taxes. The tax levy has priority over the claim of the payment bond surety and the trustee in bankruptcy established after the tax levy. ✓Forest Service Request for Advance Decision, B-211539, September 26, 1983.

The immediate contract has a "no setoff" clause. The presence of a "no setoff" clause in a contract would give the assignee a priority over IRS if the contract was validly and properly assigned to an eligible assignee in accordance with the statutory requirements in the Assignment of Claims ✓ Act, 31 U.S.C. § 3727 (1982). Reconsideration of 60 Comp. Gen. 510 (1981) Involving Set-Off Authority of Government When Contract Contains a "No Set-Off Clause," ✓62 Comp. Gen. 683 (1983), 83-2 C.P.D. ¶ 474. Here, the security agreement of May 19, 1978, between Carlson and Charlevoix is in the nature of a blanket agreement because of its general terms with no reference to any specific contract and because it covers a variety of security interests in the debtor's current and future accounts receivable. This, coupled with the fact that the agreement predates the present contract by 4 years, leads us to the conclusion that the loan obtained as a result of the assignment was not used, or available for use, by Carlson in performing the present contract which was awarded in 1982. Both our Office and the courts have taken the position that, in order for a lending institution to

achieve the status of an assignee under the Assignment of Claims Act, it has to be shown that the monies that the institution advanced to the contractor were actually used in, or at least made available for, the performance of the contract in question. See Manufacturers Hanover Trust Co. v. United States, 590 F.2d 893 (Ct. Cl. 1978); Reconsideration of 60 Comp. Gen. 510 (1981) Involving Set-Off Authority of Government When Contract Contains a "No Set-Off Clause," supra; General Services Administration--Advance Decision, 58 Comp. Gen. 619 (1979), 79-2 C.P.D. ¶ 151. ✓
Thus, Charlevoix is not protected under the Assignment of Claims Act against a setoff by the IRS.

for 
Comptroller General
of the United States